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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 339

STELLA HUGHES, PETITIONER

v.

STATE OF WASHINGTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of October 10, 1966, inviting the Solicitor General to file a brief expressing the views of the United States in this matter.

This suit was brought by the petitioner, as owner of ocean front land in the State of Washington, against the State, to quiet her title to an area of alluvion formed by gradual, natural accretion to her land. The petitioner's title derives from a federal patent issued before statehood. Her contention is that federal law is controlling, and that under federal law the seaward boundary of her property is the line of mean high tide as continually modified by gradual, natural accretion, erosion, or reliction.

The State concedes petitioner's right to alluvion deposited before statehood, but contends that upon its admission to the Union in 1889 the State became owner of the tidelands (*i.e.*, the lands between the lines of high and low tide); that State law thereupon established a permanent, immovable boundary between the petitioner's upland and the State's tideland; and that consequently all subsequent accretion along the shore belongs to the State. The Superior Court for Pacific County, relying primarily on *Borax, Ltd.* v. *Los Angeles,* 296 U.S. 10, and *United States* v. *Washington,* 294 F. 2d 830 (C.A. 9), certiorari denied, 369 U.S. 817, held (Pet. App. 33–36) that the seaward boundary of petitioner's property is determined by federal law and that under federal law an upland owner is entitled to gradual accretions. The Supreme Court of Washington, *en banc,* reversed, with two judges dissenting (Pet. App. 59–92). It held that federal law is inapplicable and that under the law of Washington the seaward boundary of ocean front property, at least when not owned by the United States, is fixed by the line of high tide on November 11, 1889—the date on which Washington was admitted to statehood.

For petitioner, the practical consequence of the decision below is that the ocean front property which her predecessor in title obtained from the United States is now held to be some 560 feet inland. In the view of the United States, the case presents an important question of federal law, involving a source of serious friction in federal-state relations, which merits review by this Court. We will show, first, the

importance of the issue and, second, the error committed by the court below in disregarding the federal law.

1. The decision below holds that, in Washington, the United States lacks the power to convey property bounded by the line of mean high tide as that line may be gradually modified by natural forces. On a coast line marked by gradual but continuous accretion, the decision means that the United States is incapable of conveying ocean front property and that its attempt to convey such property to petitioner's predecessors in title was ineffective.

The decision is of broad consequence. It trenches on a significant element of title to realty acquired from the United States in the past and it materially curtails the nature of the title that the United States may convey in the future. The decision directly affects not only petitioner, but numerous other federal patentees of coastline property in Washington, for whom this is a test case (Pet. App. 23). Equally important, it affects the powers of the United States with respect to more than 200 miles of Washington's coastline owned today by the federal government.[1] Moreover, the principle of a fixed tideland boundary

[1] The records of the Department of the Interior reveal that public and acquired lands of the United States stretch along approximately 215 miles of the Washington coast (including Puget Sound and off-shore islands). These holdings include some 93 miles in the custody of the Bureau of Sport Fisheries and Wildlife; some 50 miles in the custody of the National Park Service; and some 72 miles supervised by the Bureau of Indian Affairs. An additional 72 miles of coastline are presently being acquired for the National Park Service. As to acquired land, the United States presumably obtains no greater rights than those enjoyed by its grantors.

may readily be brought to bear on the property of the United States and its patentees in other coastal States. Cf. La. Civ. Code, Art. 510; *Zeller* v. *Southern Yacht Club,* 34 La. Ann. 837. Nor is there any apparent reason why, in Washington or elsewhere, the principle should be limited to tidelands; it can be applied with consistency of logic to the shifting banks of rivers and lakes owned by a State. Compare *Ghione* v. *Washington,* 26 Wash. 2d 635. An inducement for the adoption and expansion of this principle is not lacking, since it tends inevitably to bring land into State ownership,[2] and the sale of land thus acquired has been recognized as an attractive source of State revenue (see Pet. App. 90).

To be sure, the court below stated that it did not "question the federal government's right over its own property" and confined its decision to the "rules of property of the sovereign state in a controversy between it and one of its citizens" (Pet. App. 83). It did so in deference to the decision of the Ninth Circuit in *United States* v. *Washington,* 294 F. 2d 830, certiorari denied, 369 U.S. 817, which rejected the State's claim to ownership of accretions upon property held by the United States subject to a trust,

[2] In *Ghione* v. *Washington, supra,* the State asserted title to all land which had served as the bed of a shifting river at any time since 1889. That contention was rejected by the State Supreme Court relying on principles of State law which have at least been cast into doubt by the decision below. The only circumstance in which, under the fixed boundary rule, the State might conceivably lose property is that of coastal erosion. But Washington has not conceded that, where the 1889 line of high tide is now out at sea, the former upland owner now has title to tidelands traditionally owned by the State.

patent, issued in 1916, for the heirs of Samson Johns, an Indian. But while purporting to acquiesce in that decision, the court below failed to recognize that "the federal government's right over its own property" embraces the right effectively to dispose of such property. Indeed, the land involved in the Samson Johns case was the federal government's "own" property only in a qualified sense, inasmuch as beneficial ownership had been conveyed to Samson Johns more than 40 years earlier. As the Ninth Circuit noted (294 F. 2d 830, 832): "If the upland owner is entitled to the imperceptible accretions it is because this is an attribute of title reserved to *or obtained by grant from* the Government" (emphasis added). In holding that, by virtue of State law, the government's grantees do not obtain entitlement to such accretion, the decision below is in direct conflict with that of the Ninth Circuit.

The consequence of that conflict is readily apparent in the context of the property involved in the Samson Johns case itself. Today, and for more than 40 years past, the American Indians occupying that property have enjoyed the beneficial ownership of a tract running down to the ever-shifting line of mean high tide. Sections 5 and 6 of the General Allotment Act of February 8, 1887 (25 U.S.C. 348, 349) contemplate the eventual termination of the Johns trust—and a great many similar trusts—by a patent of legal title. Under the decision below, when that event occurs the Indians' enjoyment of adjacency to the tidelands will also terminate, at least to the extent of all future accretion. Indeed, the courts of Washington might well hold that all accretion occurring since the attain-

ment of statehood in 1889 reverts to the State when the federal government relinquishes its title. But even if that extreme position were not taken, the asserted inability of the federal government to convey to its wards an important attribute of the title it now holds in trust for them—namely the right to future accretions—would seriously inhibit the furtherance of the government's Indian program through the disposition of land. While the problem thus raised with respect to Indian lands is exemplary, it is also clear that the decision below restrains the government from disposing of the full measure of its title in connection with any program or policy which it may wish to pursue in the future. In sum, we do not believe that it can be said here, as it could in *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 68, that there is "no significant threat to any identifiable federal policy or interest".[3]

2. The precise question considered by the courts below and presented by the petition here is whether the physical limits of property conveyed under a federal patent can be altered by State law.[4] The courts

[3] In *Wallis*, *supra*, we advised the Court that in our view, "no federal interest appears to be impaired by deferring to State law." Memorandum for the United States as *Amicus Curiae*, p. 16 (No. 341, October Term, 1965).

[4] Unquestionably, a State may augment a federal patent, as many States have done, by relinquishing to the patentee some rights in or title to the adjacent water bottoms to which the State is entitled under *Pollard* v. *Hagan*, 3 How. 212. *Barney* v. *Keokuk*, 94 U.S. 324, 338. The extent of such relinquishment is of course a matter of State law. The instant case is not such a situation, but one where the State has purported to change the boundary in a way that operates to the serious disadvantage of the patentee. The invalidity of such State action was recognized in

below and the parties all assumed—correctly we believe—that, if federal law governs, petitioner is entitled to judgment. The soundness of that assumption is readily demonstrable, for this Court, in the absence of congressional legislation, has largely reaffirmed the English common law of accretion in cases of federal jurisdiction.

At common law, the title of the Crown to the lands under navigable water extended to the line of ordinary high water, as continually modified by gradual, natural processes. *Stratton* v. *Brown,* 4 Barn. & C. 485, 107 Eng. Rep. 1140 (K.B. 1825); *The King* v. *Lord Yarborough,* 2 Bligh N.S. 147, 4 Eng. Rep. 1087 (H.L. 1828); see 2 Blackstone, *Commentaries* 262. This Court has regularly relied on the common law authorities to hold that the boundary between the upland and the submerged land acquired by the States as a constitutional attribute of their sovereignty is an ambulatory boundary. *E.g., New Orleans* v. *United States,* 10 Pet. 662, 717; *Jones* v. *Johnston,* 18 How. 150, 155–156; *Banks* v. *Ogden,* 2 Wall. 57, 67; *County of St. Clair* v. *Lovingston,* 23 Wall. 46, 66; *Barney* v. *Keokuk,* 94 U.S. 324, 337–338; *Jefferis* v. *East Omaha Land Co.,* 134 U.S. 178, 189.

Under these decisions it is clear that the right to accretion recognized by federal law is not a mere appurtenance to the upland, giving a right of use in the tideland, such as the right to fill or wharf out.

Packer v. *Bird,* 137 U.S. 661, 669, where the Court said, "whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, *subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee*" (emphasis added).

It is an inherent characteristic of the upland title, resulting from the fact that the upland boundary is the water line. This "is just as fixed a boundary in the eye of the law" as a street or a wall, notwithstanding that it may gradually and imperceptibly change. *Jones* v. *Johnston,* 18 How. 150, 155. That is why it was held in *County of St. Clair* v. *Lovingston,* 23 Wall. 46, 68, "The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property."[5] This Court has also clearly pointed out the distinction between a littoral owner's rights in the adjacent beds of navigable waters, such as the right to fill or wharf out, which are controlled by State law, and his right to alluvion, which is a part of his upland title. *Shively* v. *Bowlby,* 152 U.S. 1, 35, 40.

From the foregoing, three things are apparent: *First,* this is not a case in which federal common law has to be created; over a long period of time this Court has fashioned a well developed body of legal principles applicable to the substantive issue here. Compare *Wallis* v. *Pan American Petroleum Corp.,* 384 U.S. 63, 68. The question presented, therefore, is limited to whether those federal principles, with reference to which the patent issued, are to be given

[5] This does not mean that the riparian or littoral owner has a right to have accretion occur, or a right to forestall its prevention. The State may fill in its tidelands artificially, which has the practical effect of freezing the boundary at the last natural waterline, but this does not change the nature of the title; it merely prevents the occurrence of natural events that might otherwise have enlarged the area to which that title is applicable.

effect. Thus, unlike *Wallis, supra,* the question is not "[w]hether latent federal power should be exercised to displace state law" (384 U.S. at 68), but rather whether property rights created under federal law may be divested by State action. *Second,* the federal patent under which petitioner claims must be construed to have conveyed a vested right to an ambulatory seaward boundary for it was issued prior to Washington's statehood and, presumptively, with reference to the federal decisions cited above (p. 7, *supra*).[6] Hence, it cannot be doubted (and it was not doubted below) that the State has purported to deny petitioner an attribute of title which the United States intended to convey. *Third,* the State's claim, insofar as it rests on an assertion of its sovereign title to tidelands, derives from and is measured by federal common law. This is so because its title to tidelands is based on its constitutional right to stand on an equal footing with other States. Its right in this respect can neither be less than theirs, *Pollard* v. *Hagan,* 3 How. 212, nor greater, *United States* v. *Texas,* 339 U.S. 707. The common law rule governing the sovereign's ownership of the tideland (see *supra,* p. 7), as absorbed

[6] It should be noted that the patent itself does not appear to have been put in evidence below. We assume, as the courts below assumed, that the patent in some appropriate way described a tract bounded on its seaward side by the line of high tide. We also assume that, between the time of the survey in which the tract was laid out and the time of the patentee's entry, there had not been such substantial accretion as to put the patentee on notice of the government's mistake in conveying a tract inequitably larger than those conveyed to other patentees where similar tracts were intended. See *Madison* v. *Basart,* 59 I.D. 415.

by the original States and reaffirmed by this Court, has of necessity, therefore, become the constitutional yardstick of the title obtained by all the subsequent States. That yardstick undeniably lays out an ambulatory boundary on the landward side of the State's tidelands and, thus, on the seaward side of the uplands.[7]

We think that the federal source of petitioner's title, the constitutional implications of the State's claim, as well as the substantial federal interests involved combine to demonstrate the inappropriateness of the State court's attempt to resolve the issue without reference to a well established body of federal law. That federal law does control the issue here is we think settled by this Court's decision in *Borax, Ltd.* v. *Los Angeles,* 296 U.S. 10. That case, while not concerned with accretion, did involve a disputed boundary between a State grantee of tideland and a federal patentee of upland. Chief Justice Hughes there wrote for the Court (296 U.S. at 22):

> The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law. *Packer* v. *Bird,* 137 U.S. 661, 669, 670; *Brewer-Elliott Oil Co.* v. *United States,* 260

[7] While the State may undoubtedly enlarge its holdings through an appropriate exercise of its powers of eminent domain, no such power has been invoked here, and the questions of just compensation which it would raise under the Fifth and Fourteenth Amendments have not been considered.

U.S. 77, 87; *United States* v. *Holt Bank*, 270 U.S. 49, 55, 56; *United States* v. *Utah*, 283 U.S. 64, 75. * * *

Because we see no valid ground on which to distinguish *Borax*, we believe that here, too, "the boundary between the upland and the tideland is necessarily a federal question."

CONCLUSION

For the foregoing reasons, we urge that the petition for a writ of certiorari be granted and the judgment of the Supreme Court of Washington be reversed.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
EDWIN L. WEISL, JR.,
Assistant Attorney General.
ROBERT S. RIFKIND,
Assistant to the Solicitor General.
ROGER P. MARQUIS,
GEORGE S. SWARTH,
Attorneys.

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